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In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK MAZZEI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. A) is reported at 521 F. 2d 639. The opinion of the district court (Pet. App. B) is reported at 390 F. Supp. 1098.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1975. The petition for a writ of certiorari was filed on August 28, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the showing of the effect on interstate commerce of extortionate payments was sufficient to satisfy the jurisdictional requirements of the Hobbs Act, 18 U.S.C. 1951.

2. Whether a state senator who abuses the power of his office by accepting payments in return for the awarding of state leases may be convicted of extortion under color of official right under 18 U.S.C. 1951.

STATUTE INVOLVED

18 U.S.C. 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of two counts of extortion under color of official right, in violation of 18 U.S.C. 1951 (a) and (b)(2). He was sentenced to five years' imprisonment on each count, the sentences to run concurrently. He was also fined $10,000 on each count and ordered removed from his office as a Pennsylvania State Senator. The court of appeals, sitting *en banc,* affirmed the convictions, two judges dissenting, but modified the sentence by deleting the provision removing petitioner from state office (Pet. App. A-1—A-32).

B.M.I. Incorporated ("B.M.I."), the parent corporation of 16 wholly-owned subsidiaries, had its headquarters in Pittsburgh, Pennsylvania, and, together with its subsidiaries, was engaged in interstate commerce (Tr. 98–127, 133–138). In late 1971, B.M.I. decided to lease the vacant portion of its office building. Leo Kelly, an officer of B.M.I., discussed with Gerald Creehan, an officer of a local bank, the possibility of the State of Pennsylvania's leasing a portion of the building. Creehan informed Kelly that petitioner, a Pennsylvania State Senator, was looking for office space for the Pennsylvania Lottery Commission.[1] At a meeting arranged by Creehan on November 26, 1971, Kelly informed petitioner of his interest in obtaining such a state lease (Tr. 188–191, 195–198, 496).

In December, 1971, petitioner and another man inspected B.M.I.'s building. On January 8, 1972, Cree-

[1] Petitioner was the sponsor of the Pennsylvania Lottery Law, which became effective on August 26, 1971 (Tr. 187, 198).

han, Kelly and petitioner met for dinner and again discussed leasing part of B.M.I.'s building to the State Lottery Commission. Two days later, a Mr. Coll from the Pennsylvania Department of Property and Supplies inspected B.M.I.'s premises and gave Kelly the forms necessary to apply for a state lease. Kelly had never previously discussed the lease with any state official besides petitioner and had never communicated with the Department of Property and Supplies (Tr. 199–205).

On January 11, 1972, petitioner arrived unexpectedly at Kelly's office and informed him that $4.25 a square foot was the maximum rental that the state would pay. He also instructed Kelly that "it was the practice on all state leases that ten percent of the gross amount * * * be paid to a senate finance re-election committee * * *," payable in cash at the inception of the lease (Tr. 206–207, 215). Petitioner calculated the state's five year rental at $4.25 a square foot and obtained Kelly's consent to payment of ten percent of that amount (Tr. 207–209; Gov't Exh. 7).

On February 23, 1972, B.M.I. received an unexecuted lease from the state for a portion of its vacant space, at a rental of $4.25 a square foot; B.M.I. thereafter signed and returned this lease.[2] On March 23, 1972, B.M.I. received a fully executed lease from the state (Tr. 221–224). The next day, B.M.I. withdrew $8,755, or ten percent of the five-year rental fee, from

[2] Lottery Commission personnel had begun moving into B.M.I.'s premises on February 14, 1972. (Tr. 222).

its bank account and directed Creehan to deliver the funds to petitioner (Tr. 499–505).[3]

Late in 1972, petitioner arrived at Kelly's office on his own initiative and inquired whether B.M.I. would be interested in leasing space to the Department of Labor and Industry. Kelly assented, and on December 27, 1972, petitioner and three other state officials inspected the premises (Tr. 251–253). After several other visits from state officials, Mr. Coll again reviewed the premises and left the necessary forms with B.M.I. Kelly did not discuss the rental rate or other terms of the lease with Coll or any of the other state employees (Tr. 253–254).

In early April, 1973, petitioner informed Kelly that a rental rate of $4.90 a square foot would be acceptable and that the same ten percent kickback arrangement would apply to this lease (Tr. 254–255). On April 12, 1973, Kelly prepared and forwarded to the Department of Property a lease proposal requesting a rental rate of $4.35 a square foot, excluding janitorial services. Shortly thereafter, petitioner telephoned Kelly and informed him that the rate had to be $4.90 a square foot and that the lease must include janitorial services. Kelly never submitted a revised lease proposal, but on May 28, 1973, B.M.I. received from the state an unexecuted lease specify-

[3] No evidence was introduced at trial that this money ever reached a senate finance re-election committee or that any such committee even existed.

ing a rental rate of $4.90. This lease was executed and returned (Tr. 259–262).

On July 20, 1973, petitioner called Kelly and told him that B.M.I. would be awarded the lease and insisted that the cash payment be delivered immediately. Kelly withdrew $11,300 from B.M.I.'s payroll accounts and delivered the money to petitioner (Tr. 267–275, 512).

Kelly testified at trial that he made the payments petitioner demanded because "[h]e was the one who had set up the lease rate and who we negotiated with," and that he accepted the petitioner's word as "gospel" that this was the method by which state leases were arranged. He stated that he presumed that the political procedure followed in state government allowed petitioner to exert influence and power in handling state leases (Tr. 278, 411).

ARGUMENT

1. Petitioner contends (Pet. 12–14) that the government failed to establish the necessary jurisdictional element that these transactions affected interstate commerce. The court of appeals correctly rejected this argument (Pet. App. A–4 to A–6). It is uncontested that the B.M.I. enterprise, through its 16 subsidiaries, was substantially engaged in interstate commerce (Pet. 5; Pet App. A–5). The payment of $20,000 to petitioner depleted the resources of B.M.I. and *pro tanto* impaired the ability of the enterprise to carry on its business in interstate commerce. Such

a depletion of assets is sufficient under the Hobbs Act to establish federal jurisdiction over the offense.[4]

Petitioner argues (Pet. 13–14) that the activities here were entirely local in nature and did not have a close and substantial relationship to interstate commerce, and that the application of the depletion of assets theory violates the Commerce Clause. But since B.M.I. was engaged in interstate commerce through its subsidiaries, it is of little moment that the actual extortionate lease transactions were themselves local because if, as the court of appeals found (Pet. App. A–5 to A–6), they sufficiently affect interstate commerce, they are properly subject to congressional prohibition.[5] *Perez* v. *United States,* 402 U.S. 146, 151–

[4] *United States* v. *Crowley*, 504 F. 2d 992, 998 (C.A. 7); *United States* v. *Pacente*, 503 F. 2d 543, 550 (C.A. 7), certiorari denied, 419 U.S. 1048; *United States* v. *DeMet*, 486 F. 2d 816, 821 (C.A. 7), certiorari denied, 416 969; *United States* v. *Augello*, 451 F. 2d 1167, 1169–1170 (C.A. 2), certiorari denied, 405 U.S. 1070; *United States* v. *Addonizio*, 451 F. 2d 49, 77 (C.A. 3), certiorari denied, 405 U.S. 936; *United States* v. *Provenzano*, 334 F. 2d 678, 692–693 (C.A. 3), certiorari denied, 379 U.S. 947.

[5] Petitioner's argument (Pet. 13) that the court of appeals improperly expanded federal jurisdiction over inherently local activities is incorrect. One purpose of the Federal Anti-Racketeering Act of 1934, as amended by the Hobbs Act in 1946, was to eliminate the "'levy of blackmail upon industry, especially upon relatively small shops,'" which local authorities could not, or would not, check. *United States* v. *Staszcuk*, 517 F. 2d 53, 57 (C.A. 7), certiorari denied, No. 74–1579, October 6, 1975. As long as interstate commerce is affected by such activities, Congress has the power, which it fully executed in the Hobbs Act, to prohibit them. *Stirone* v. *United States*, 361 U.S. 212; see, *e.g.*, *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241; *United States* v. *Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460.

154; see *United States* v. *DeMet,* 486 F. 2d 816 (C.A. 7), certiorari denied, 416 U.S. 969; *United States* v. *Women's Sportswear Mfrs. Ass'n,* 336 U.S. 460, 464. The government need not prove that the purpose of the extortion was to affect interstate commerce, as long as one of its natural effects was to do so. See, *e.g., United States* v. *Addonizio,* 451 F. 2d 49, 77 (C.A. 3), certiorari denied, 405 U.S. 936.

In enacting the Hobbs Act, Congress intended to utilize to the fullest extent its constitutional power to regulate commerce.[6] *Stirone* v. *United States,* 361 U.S. 212, 215; *United States* v. *Staszcuk,* 517 F. 2d 53, 58–59 (C.A. 7) (*en banc*), certiorari denied, No. 74–1579, October 6, 1975. The purpose of the Act parallels the central design of the Commerce Clause itself and therefore proscribes extortion that "in any way or degree obstructs, delays or affects commerce." *United States* v. *Staszcuk, supra,* 517 F. 2d at 58. Given Congress' power to reach any acts which have a sufficient effect on interstate commerce, the court of appeals properly held that the depletion of a com-

[6] Petitioner's reliance (Pet. 11) on *United States* v. *Enmons,* 410 U.S. 396, for the proposition that federal criminal jurisdiction under the Hobbs Act should be narrowly construed, is misplaced. The Court there refused to extend the Hobbs Act to include violence and threats which were intended to achieve the otherwise legitimate objectives of employees in a wage dispute. In light of the language and legislative history of the Act, the Court held that Congress did not intend the Act to reach such conduct (*id.* at 411). In the instant case, however, petitioner's objective—the receipt of money from B.M.I. in return for the granting of state leases—was not legitimate.

pany's assets that lessens its ability to engage in interstate commerce is within the ambit of the statute and the commerce power (Pet. App. A–6).

Finally, petitioner asserts (Pet. 13) that since B.M.I. received a net economic benefit of $180,000 from these transactions, his extortionate activities had no effect on interstate commerce. That the payor of a kickback received a positive return from the transaction, however, does not remove the scheme from the prohibitions of the Hobbs Act. As the court of appeals stated (Pet. App. A–6, n.1):

> We do not consider that an absence of effect on interstate commerce is shown by the fact that B.M.I. had a net cash inflow by reason of entering into the leases. Although B.M.I. undoubtedly used [petitioner's] influence to put itself in a position where the award of state leases was likely, at that point it had the right to receive the full rental, described by state officials as completely reasonable, without paying [petitioner] some $20,000 to insure that the lease opportunities were not lost.

This holding is correct in light of the congressional intention to prohibit extortion which "in any way or degree obstructs, delays or affects commerce." *E.g., United States* v. *Addonizio, supra,* 451 F. 2d at 76–77 (payment of kickbacks extracted from a contractor in return for award of construction contract violates the Hobbs Act).

2. Petitioner contends (Pet. 9–10) that because he did not have *de jure* power as a state senator to award

state leases, his conduct amounted to no more than "influence-peddling" and did not constitute extortion. The court of appeals properly rejected this argument (Pet. App. A–6 to A–11).

Petitioner's conduct constituted extortion "under color of official right" as that term is used in the Hobbs Act.[7] The evidence established petitioner's practical ability to determine who would be awarded state leases and his use of that power to extract payments of approximately $20,000 from B.M.I. While petitioner did not hold, by reason of his office, the *de jure* power to grant such leases (Pet. App. A–7), it is sufficient for conviction under the Hobbs Act that he possessed *de facto* power to do so or that B.M.I. reasonably believed that he was so empowered, predicated upon his assertion of *de facto* power. *United States* v. *Price*, 507 F. 2d 1349, 1350 (C.A. 4); *United States* v. *Braasch*, 505 F. 2d 139 (C.A. 7), certiorari denied, 421 U.S. 916; see *United States* v. *Staszcuk*, 502 F. 2d 875, 878 n.6 (C.A. 7), affirmed in part and

[7] As this Court stated in *United States* v. *Nardello*, 393 U.S. 286, 289:

"At common law a public official who under color of office obtained the property of another not due either to the office or the official was guilty of extortion."

See also, Stern, *Prosecutions of Local Political Corruption Under the Hobbs Act: The Unnecessary Distinction Between Bribery and Extortion*, 3 Seton Hall L. Rev. 1 (1971). Congress included common law extortion within the Hobbs Act's disjunctive definition of extortion. See *United States* v. *Kenny*, 462 F. 2d 1205 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States*, 409 U.S. 914.

reversed in part *en banc*, 517 F. 2d 53, certiorari denied, No. 74–1579, October 6, 1975. Thus, in *United States* v. *Braasch, supra*, 505 F. 2d at 151, Mr. Justice Clark stated:

> It matters not whether the public official induces payments to perform his duties or not to perform his duties, or even, as here, to perform or not to perform acts unrelated to his duties which can only be undertaken because of his official position. So long as the motivation for the payment focuses on the recipient's office, the conduct falls within the ambit of [the Hobbs Act]. That such conduct may also constitute "classic bribery" is not a relevant consideration.

In the instant case, the court of appeals found (Pet. App. A–9):

> Thus, [petitioner] had the ability to initiate state inspection of the premises, to specify rental rates that would be and were acceptable to the state, and to alter B.M.I.'s proposal on the second lease. Also, throughout the lease negotiations, [petitioner] displayed to Kelly intimate knowledge of the decision making process involved in the granting of state leases. This, in our view, constituted sufficient evidence to justify a finding by the jury that Kelly could reasonably have believed that as a concomitant of his official position [petitioner] possessed not mere influence over state leases but in fact had effective power to determine to whom these leases were awarded even though his office gave him no such *de jure* power.

Indeed, petitioner himself established the connection between the granting of state leases and his senatorial office when he advised Kelly that payment of a ten percent kickback to a senate finance reelection committee was required on all state leases (Tr. 207). The motivation of these payments focused on petitioner's office, and it is this wrongful use of public office that 18 U.S.C. 1951 prohibits. *United States* v. *Price, supra.*

The trial court's instructions correctly stated that petitioner could be convicted if the jury found that petitioner misused his office by holding himself out as being able to influence the granting of leases (Tr. 944–950), or that Kelly reasonably believed that the senator's official functions included the securing of leases with the state (Tr. 944). The evidence supported the verdict on these counts. That petitioner's conduct may also have constituted "influence-peddling" is irrelevant. *United States* v. *Braasch, supra.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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